APPEAL NO. 93150
FILED APRIL 14, 1993

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.10 through 11.10 (Vernon Supp. 1993). On January 21 and 22, 1993, a contested hearing was held. He (hearing officer) determined that respondent (claimant) sustained a compensable injury on _____. The appellant (carrier) asserts that the claimant was previously diagnosed with major depression and any incident which involved claimant on _____, if harmful to her, resulted from a legitimate personnel action. Claimant responded by contesting some parts of the hearing officer's opinion but agreed with the overall decision.

DECISION

Finding that the great weight of the evidence does not show that a definite time, place and cause was shown as to the mental injury, and even if such were shown, that the great weight and preponderance of the evidence is against the determination that any mental injury is not the result of a legitimate personnel action, we reverse and render.

Claimant worked for (employer). She had worked as a word processor for several years; but earlier in 1992, she became a claims reviewer. In this position she routed files to adjusters in several separate units within the same office. Each unit dealt either with property, fire, or personal injury claims and had a separate supervisor. Claimant was under Mr. G who headed a personal injury unit. Ms. S headed a property loss unit to which claimant also routed files.

On August 17th, claimant had asked her boss if she might get help from a person who worked for Ms. S. Mr. G arranged for help through Ms. S. The next day, _____, claimant decided she needed the helper to assist in a different manner and approached Ms. S about this. Ms. S at first said yes, then thought about it and asked claimant for more details. Upon getting more information, Ms. S thought that claimant should do her own work. Claimant opined that Mr. G should say whether she got more help. Both approached Mr. G's office where he was observed to be in a telephone conversation. After a short wait, Ms. S suggested that claimant return to work. Claimant did not choose to do that. Claimant testified that Ms. S "got in her face" and basically ordered her to go back to work. Claimant said she wanted to wait. She then testified that Ms. S said, "[y]ou need to go back to your desk and do your work and do what I tell you to do - or I'll tell B" (Mr. G's first name is "B"). Claimant added that she told Ms. S not to raise her voice.

After a period of time, Mr. G finished and both entered his office. Claimant discussed the need for help and Ms. S told Mr. G that claimant did not go back to work when she told her to do so. Ms. S left the office and claimant and Mr. G continued the discussion about the work (priorities and goals were among the points discussed) for about 30 minutes. Claimant went back to her desk and worked or wrote letters for

approximately one hour and then left the office. She called her husband at some time from some place, possibly (city), (state), in what one doctor described as a "fugue like state."

Ms. S testified that she was the unit chief of the property claims unit and that claimant reviewed and sent claims files out to her people, Mr. G's people and those in other units. She said she did not "get in claimant's face" and did not yell or raise her voice. She did believe claimant was insubordinate and told Mr. G this in claimant's presence. She agreed that claimant had approached her about changing the assistance that was being provided through Ms. S to claimant.

Mr. G was on the phone when the two were outside his office. His door was open. He opined that he would have heard yelling if it occurred. He did not hear any. He testified that he has never heard Ms. S yell or raise her voice. He testified that in the instance described (there was no significant disparity in the testimony that claimant had received assistance, claimant sought a changed degree of assistance from Ms. S, Ms. S was not the supervisor of claimant, but claimant had work obligations to people outside Mr. G's unit), Ms. S did not interfere with claimant, Ms. S was not out of line to respond to claimant, and he would expect claimant to return to work when Ms. S had indicated that such was desirable. Ms. S did tell him of claimant's failure to go back to work. He and claimant talked for 30 to 45 minutes about her room for improvement, priorities, and goals. There was no yelling or crying by anyone in his office and no untoward action of any kind was mentioned as having taken place therein. Claimant was not agitated, but appeared not to agree with all that Mr. G said, but he felt that when the meeting was over, the matter was resolved.

Claimant had been hospitalized previously for major depression in 1988. She was on Prozac on _____. She had had a performance review with Mr. G in July 1992, and claimant's goals for the coming year had been discussed the previous Tuesday, _____. On August 13, 1992, claimant wrote a memo to Mr. G talking of being bombarded with complaints, the inadequacy of the instruction she had received, and the fact that another person would be trained in her position. The doctor she saw was Dr. S. Dr. S's last note about claimant prior to _____ was on March 26, 1992, and appears to record a telephone call from claimant. In that note Dr. S writes, in part, "I am going back into my rut. I wanted to come and see before this. . . . There is a likelihood of losing job. Sleep: poor. Appetite: is less. Bad headaches."

When her husband brought claimant back from (state), she again saw Dr. S on August 21, 1992. Dr. S wrote that she reported some sort of argument in her office before her departure. He states that claimant looked perplexed and flat. He notes that she has been on Prozac for a year. (Claimant testified that Dr. S decreased her Prozac at this time.) He assessed that she "might have gone through a `fugue like' reaction" but she cannot give any detail of the precipitating factor. On October 21st, notes in Dr. S's records say that claimant had no idea of how this episode happened

to her. Dr. S on August 21st also wrote on a prescription size note, "recommend absolute rest for one week. Patient had an "acute fugue reaction." On another undated note, Dr. S says that claimant is under his care and is to resume her duties on September 14th. "In view of dissociative reaction after stressful situations, (claimant) is advised to work part time. . . ."

Claimant also saw Dr. K, also a psychiatrist, who said in a letter dated October 13, 1992, that claimant had been diagnosed as "major depression, recurrent, S/P Dissociative episode on _____." He added that she should not be in stressful situations. The carrier introduced a letter from claimant to Dr. K dated December 29, 1992, in which claimant referred to Dr. K's letter of October 13th and referred to the fact that the carrier was questioning the lack of attribution of the fugue to the incident of _____; that letter also mentioned the possibility that Dr. K would need to appear at a hearing. We note that claimant introduced no additional letter from Dr. K connecting the _____ work to the fugue and that he did not testify at the hearing.

The medical records do not show that a particular incident occurring at a definite time and place caused the claimant's reaction. The hearing officer made no findings that claimant's injury was caused by a particular event at a definite time and place, although he found that claimant experienced feelings of intimidation and being threatened which triggered a "fugue" like amnesic reaction. There was no finding as to when claimant had these feelings or what, if anything, arising out of the work caused them. Similarly, there was no finding that anyone yelled at the claimant. There was a negative finding that claimant was not the subject of any personnel actions by the employer on _____. In Texas Workers' Compensation Commission Appeal No. 92266, dated August 3, 1992, the Appeals Panel commented that "no physician's record in evidence purports to ascribe a cause to the condition." That opinion looked at Dir. State Employees Workers' Compensation v. Camarata, 768 S.W.2d 427 (Tex. Civ. App.-El Paso 1989, no writ) and commented that while that case said claimant's testimony itself was sufficient to trace his problem to a particular event, it also had physician testimony that said that when Camarata read the memo about his work it "caused him to suffer from a post-traumatic stress disorder. . . ." In Camarata, the claimant immediately became upset and struck his fist against a stack of paper. After Camarata, Duncan v. Employers Casualty Co., 823 S.W.2d 722 (Tex. App.-El Paso 1992, n.w.h.) pointed to the testimony of the physician in Camarata as showing causation, and cited Transportation Insurance Co. v. Maksyn, 580 S.W.2d 334 (Tex. 1979) for the criteria that there must be a showing of a "definite date, place, and cause." That case had pointed out that physical activities are identifiable and traceable, but "worry, anxiety, tension" are not. The Appeals Panel had also considered the cases of University of Texas v. Schieffer, 588 S.W.2d 602 (Tex. Civ. App.-Austin 1979, writ ref'd n.r.e.), Maksyn, and Duncan in Texas Workers' Compensation Commission Appeal No. 92210, dated June 29, 1992.

The hearing officer did not, as stated, make findings as to time, place, and cause

of any mental trauma of the claimant. The evidence is not sufficient for the Appeals Panel on review to imply those findings in view of the lack of medical evidence, the evidence of other stressful events at work in the weeks before _____, and claimant's own testimony of her attribution of the reaction to her discussion with Ms. S through a process of elimination.

If the hearing officer had made a finding that the mental trauma of the claimant was caused by the discussion with Ms. S at work on _____, and if that finding was sufficiently supported by evidence of record, the question of whether the trauma occurred as part of a legitimate personnel action would still be before us. *See* Article 8308-4.02 of the 1989 Act, which states that recovery for mental trauma was not changed by the 1989 Act, but states that a mental injury from a legitimate personnel action is not compensable. In Texas Workers' Compensation Commission Appeal No. 92710, dated February 16, 1993, not only was the Duncan case quoted as even allowing a negative reaction to an undeserved reprimand within the exception found in Article 8308-4.02(b), but it was said, "[i]t is clear to us that discussion with a supervisor about matters relating to the ability to get along with coworkers in the performance of the work qualifies as a legitimate personnel action." This opinion cited Texas Workers' Compensation Commission Appeal No. 92149, cited May 22, 1992, for indicating that evaluations would also be included in Article 8308-4.02(b), although not specifically listed. Appeal No. 92149 also affirmed a determination that a directive to one employee to work with another was a legitimate personnel action; that opinion also pointed to "the absence of evidence showing the personnel action of employer to be other than legitimate. . . ." In the review before the Appeals Panel now, where there is evidence that claimant sought out the supervisor of another unit that claimant supported, Ms. S, and asked her help, and there is testimony that Mr. G, claimant's own supervisor, said that Ms. S was not out of line in telling claimant to return to work; an admonition to return to work coupled with an assertion that claimant's own supervisor would be told, is not unlike an evaluation, or a discussion about getting along with other workers, or an instruction to work with a particular employee--this too is a personnel action. (*See* Appeal 92710 and 92149, *supra*). *Also see* Texas Workers' Compensation Commission Appeal No. 93137, dated April 7, 1993, which indicated that the employer had produced credible evidence of the legitimacy of an investigation conducted of a policeman's activity regarding injury to a suspect. That opinion then said, "Concluding that the claimant did not show that the communication of a personnel action in this case was contrary to law, employers' policies, or any other requirement that would render illegitimate the underlying personnel action, the provisions of Article 8308-4.02(b) apply. . . ." In the appeal before the panel now, it has not been shown that the actions of Ms. S, if causative of mental trauma, were not legitimate in directing claimant to work at her regular task and in revealing that claimant's boss would be informed of her conduct. (We note that Ms. S did not instruct claimant to do work other than her normal duties, assigned by her own supervisor, Mr. G.)

The decision and order are reversed and rendered that a compensable mental injury has not been shown.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge